Supreme Court, U.S.
FILED
JUL 2 1997
OFFICE OF THE CLERK

Nos. 96-1550 and 96-1551

In the Supreme Court of the United States

OCTOBER TERM, 1996

MARYLAND STATE DEPARTMENT OF EDUCATION, DIVISION OF REHABILITATION SERVICES, PETITIONER

v.

DEPARTMENT OF VETERANS AFFAIRS, ET AL.

NATIONAL FEDERATION OF THE BLIND, ET AL., PETITIONERS

v.

DEPARTMENT OF VETERAN AFFAIRS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether an arbitration panel convened under the Randolph-Sheppard Act, 20 U.S.C. 107d-1(b), 107d-2(b)(2), to resolve a dispute between a state licensing agency and a federal entity, may go beyond determining whether a statutory violation occurred and order a federal entity found to be in violation of the Act to take specific remedial action.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a)[1] is reported at 98 F.3d 165. The opinion and order of the district court (Pet. App. 17a-31a) are reported at 896 F. Supp. 513. The arbitration panel's final

[1] References to "Pet. App." are to the appendix to the petition in No. 96-1550.

award (Pet. App. 40a-45a) and its earlier opinion and award (Pet. App. 32a-39a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1996. Petitions for rehearing were denied on December 31, 1996. Pet. App. 15a-16a. The petition for a writ of certiorari in No. 96-1551 was filed on March 28, 1997. The petition for a writ of certiorari in No. 96-1550 was filed on March 31, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises under the Randolph-Sheppard Act, 20 U.S.C. 107-107f, a cooperative federal/state program for licensing, training and placing qualified blind persons as operators of vending facilities on federal property. The Act provides that, "[i]n authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency." 20 U.S.C. 107(b). Under the Act, the design for every newly constructed federal government building must include a satisfactory site for a Randolph-Sheppard Act vending facility. 20 U.S.C. 107a(d)(1). The Act charges the Secretary of Education with responsibility for interpreting and enforcing its provisions, including prescribing regulations to ensure that, "wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility * * * would not adversely affect the interests of the United States." 20 U.S.C. 107(b)(2); see 20 U.S.C. 107a(a). "Any limitation on the placement or operation of a vending facility based on a finding that such placement or operation would

adversely affect the interests of the United States shall be fully justified in writing to the Secretary [of Education], who shall determine whether such limitation is justified." 20 U.S.C. 107(b).

The Act is implemented in the various States by state agencies that are selected by the Secretary to act as licensing agencies. 20 U.S.C. 107a(a)(1), 107b. State licensing agencies are authorized to, *inter alia*, issue licenses and select the location and type of vending facility at a federal property, with the approval of the head of the federal entity controlling the property. 20 U.S.C. 107a(a)(5), 107a(c). A state licensing agency applies to the appropriate federal entity for a permit to establish a site for a licensed blind vendor on federal property. 20 U.S.C. 107a(c); 34 C.F.R. 395.16. Selected vendors earn income from the profits of the vending facilities they operate and from a fund established under the statutory scheme. 20 U.S.C. 107a(a)(1), 107b(3)(D), 107d-3.

The Act further provides that, if a state licensing agency determines that a federal entity that controls federal property is failing to comply with the provisions of the Act or regulations issued thereunder, the state licensing agency may file a complaint with the Secretary of Education. 20 U.S.C. 107d-1(b). Upon receipt of such a complaint, "the Secretary shall convene an ad hoc arbitration panel" to arbitrate that dispute. 20 U.S.C. 107d-1(b), 107d-2(a). The arbitration panel consists of three members, including one person designated by the state licensing agency, one person designated by the head of the federal entity controlling the federal property over which the dispute arose, and one person jointly designated by the first two members. 20 U.S.C. 107d-2(b)(2). If a party fails to designate a panel member, the Secre-

tary of Education designates a member on the party's behalf. 20 U.S.C. 107d-2(b)(2). The panel must, in accordance with certain provisions of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, "give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action" for purposes of the APA. 20 U.S.C. 107d-2(a). If the panel finds that "the acts or practices" of the federal entity are in violation of the Act or regulations issued thereunder,

> the head of any such * * * agency * * * shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel.

20 U.S.C. 107d-2(b)(2).[2]

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[2] Under the statutory scheme, federal agencies do not have a direct relationship with the blind licensees. If a blind licensee is "dissatisfied with any action arising from the operation or administration of the vending facility program," the licensee may obtain a full evidentiary hearing before the state licensing agency. 20 U.S.C. 107d-1(a). If the licensee is dissatisfied with "any action taken or decision rendered as a result of such hearing," the licensee may file a complaint with the Secretary, who must convene a panel under Sections 107d-1(a) and 107d-2(b)(1), to arbitrate the dispute. That panel consists of three persons, one designated by the state licensing agency, one designated by the blind licensee, and one designated by the first two members. 20 U.S.C. 107d-2(b)(1). As under Section 107d-2(b)(2), the Secretary designates a member if a party fails to do so. *Ibid.* Like an arbitration panel designated under Section 107d-2(b)(2) to resolve a dispute between a federal entity and a state licensing agency, the arbitration panel must, in accordance with certain provisions of the APA, "give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action" for purposes of the APA. 20 U.S.C. 107d-2(a). Unlike the procedure under Section

2. Petitioner in No. 96-1550, the Maryland State Department of Education, Division of Rehabilitation Services, is designated as the state licensing agency under the Randolph-Sheppard Act in the State of Maryland. Petitioners in No. 96-1551 are the National Federation of the Blind and Donald J. Morris, a blind individual residing in the State of Maryland.[3]

In 1987, respondent, the Department of Veterans Affairs,[4] began construction of the Veteran Affairs Medical Center in Baltimore, Maryland. Petitioner was not afforded notice of the construction as required under the Act, 20 U.S.C. 107a(d)(1), but it learned of the project and applied to respondent for a permit in December 1991 to operate a Randolph-Sheppard Act vending facility at the new VA center. Pet. App. 5a, 18a. Respondent denied the request, and petitioner filed a complaint with the Secretary of Education for arbitration pursuant to Sections 107d-1(b) and 107d-2(b)(2). *Id.* at 5a.

After a hearing, the arbitration panel issued an order on May 5, 1994, rejecting respondent's conten-

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107d-2(b)(2), however, Section 107d-2(b)(1) is silent regarding any limitations on the panel's authority to remedy violations.

[3] The petitioners in No. 96-1551 were not parties in the district court proceedings, but the National Federation of the Blind filed a brief as *amicus curiae* supporting the Maryland State Department of Education, Division of Rehabilitation Services, in the court of appeals. Both petitioners in No. 96-1551 became intervenors in the court of appeals for purposes of filing a petition for rehearing with suggestion of rehearing en banc. Pet. App. 15a-16a. References to "petitioner" in the singular refer to the petitioner in No. 96-1550.

[4] Petitioner brought this action against the Department of Veterans Affairs and several officials of that Department, all of whom we refer to collectively as respondent.

tion that the Act should not apply to the new facility[5] and directing the parties to "enter into negotiations leading to a permit that will allow [petitioner] and its licensed blind vendor or vendors to operate the retail store" at the Baltimore site. Pet. App. 39a. The arbitration panel further ordered that, if the parties failed to agree on such a permit by a specified date, each party should submit a proposed permit and the permit preferred by the majority of the panel would become the panel's final award. *Ibid.* The panel ultimately issued a final order denying respondent's motion for reconsideration, adopting the only permit proposed (that of petitioner), and directing respondent to "turn over the operation of the retail store" at the Baltimore site to petitioner. *Id.* at 5a-6a, 39a-41a.

3. Petitioner brought the instant action in the United States District Court for the District of Maryland, seeking enforcement of the arbitration

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[5] Respondent initially took the position that the Randolph-Sheppard Act was inapplicable to its medical facilities because of the Veterans' Canteen Service Act (VCS Act), 38 U.S.C. 7801 *et seq.* The VCS is an independent unit within the Department of Veterans Affairs established "for the primary purpose of making available to [hospitalized] veterans * * * at reasonable prices, articles of merchandise and services essential to their comfort and well-being." 38 U.S.C. 7801. Respondent operates stores and canteens under the VCS Act in its hospitals where it deems it "necessary and practicable" to do so. Pet. App. 6a n.2; 38 U.S.C. 7802(1). The arbitration panel in this case concluded (with one panel member dissenting) that the then-recent decision in *Minnesota, Department of Jobs and Training* v. *Riley*, 18 F.3d 606 (8th Cir. 1994), controlled and required rejection of the argument that the Randolph-Sheppard Act does not apply to VA facilities. Pet. App. 34a-38a, 42a-45a. Respondent did not press that argument in the courts below. *Id.* at 21a.

panel's award. On cross-motions for summary judgment, the district court entered judgment for respondent. Pet. App. 17a-31a. The court held that the arbitration panel had exceeded its statutory authority by ordering respondent to take specific remedial action. *Id.* at 6a-7a, 26a-27a. The court reasoned that, "under the [Randolph-Sheppard Act] it is the role of the agency head, in this case the Secretary of Veterans Affairs, to remedy any violation of the Act." *Id.* at 26a (citing 20 U.S.C. 107d-2(b)(2)). The court expressed its agreement with the view of the Eleventh Circuit in *Georgia Department of Human Resources* v. *Nash*, 915 F.2d 1482 (1990), that an arbitration panel convened under Section 107d-2(b)(2) "has no remedial powers whatsoever. It may determine that certain of the federal entity's acts violate the Act, but the Act leaves responsibility for remedying the violation to the federal entity itself." Pet. App. 26a-27a (quoting *Nash*, 915 F.2d at 1492, and citing *United States* v. *Mississippi Vocational Rehabilitation for the Blind*, 794 F. Supp. 1344, 1352 (S.D. Miss. (1992)).[6]

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[6] At the suggestion of the district court, petitioner had added a plea for alternative relief, requesting that the court exercise its equity powers and order respondent to comply with the Act. Pet. App. 22a-25a, 27a. The court ultimately declined to grant such relief, however, concluding that the record as it stood did not show that respondent had violated the Act. *Id.* at 29a. The court also noted that it was not resolving various issues concerning respondent's order regarding alternative sites, which had been issued during the pendency of the court proceedings. See *id.* at 22a-25a, 27a-30a.

4. The court of appeals affirmed. Pet. App. 1a-14a. It ruled that "the plain language of § 107d-2(b)(2) limits the authority of an arbitration panel convened under § 107d-1(b) to a determination of whether the acts of the federal entity 'are in violation' of the substantive provisions of the Act." *Id.* at 9a. The court read Section 107d-2(b)(2) to provide "that a § 107d-1(b) arbitration panel will determine whether the federal entity is in violation of the Act, while the head of the federal entity will remedy the violation." *Id.* at 9a-10a. Thus, the court concluded, "the statute places the responsibility for ending the violation on the head of the federal entity and does not authorize a § 107d-1(b) arbitration panel to order the federal entity to take specific remedial action." *Id.* at 9a-10a.

The court of appeals pointed to the Eleventh Circuit's discussion of "the differences between the remedial procedures provided under § 107d-1(a) for complaints filed by blind licensees against the state licensing agency and those provided under § 107d-1(b) for complaints filed by the state licensing agency against a federal entity." Pet. App. 10a (citing *Nash*, 915 F.2d at 1491-1492); see note 2, *supra* (describing process for arbitration panel convened under Sections 107d-1(a) and 107d-2(b)(1), rather than Sections 107d-1(b) and 107d-2(b)(2)). The court agreed with the *Nash* court's view that, unlike an arbitration panel convened under Section 107d-1(a), a panel convened under Section 107d-1(b) does not have authority to order a specific remedy, but rather is limited by the text of the Act to a determination of whether the federal entity's acts "are in violation" of the Act. Pet. App. 11a (quoting *Nash*, 915 F.2d at 1492).

The court below declined to rule that a Section 107d-1(b) arbitration panel has broader authority

based on the statement in *Randolph-Sheppard Vendors of America* v. *Weinberger*, 795 F.2d 90, 109 (D.C. Cir. 1986), that the Secretary of Education "has broad remedial powers under the Act." Pet. App. 11a. The court noted that that statement was not supported by any articulated rationale or any explanation of the effect of the language in Section 107d-2(b) that specifies that the head of the federal entity has the responsibility to remedy any statutory violations found by the arbitration panel. *Id.* at 11a-12a.

ARGUMENT

1. Petitioner contends (96-1550 Pet. 11) that the court of appeals' ruling constitutes a "complete disregard of the presumption applied in this Court's decisions approving remedies when findings have been made that federal law has been violated." Petitioner argues (*id.* at 11-16) that the court should have interpreted the Randolph-Sheppard Act to authorize arbitration panels convened under Section 107d-2(b)(2) to enter specific remedial orders, relying on a presumption in favor of all appropriate relief drawn from *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 69 (1992), and the cases cited therein.[7]

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[7] See also 96-1551 Pet. 22, 27 (asserting that court of appeals' ruling is inconsistent with *Franklin*, thereby creating constitutional problems, and is in tension with federal labor law); Wisconsin Academy of Trial Lawyers et al. *Amici* Br. 18-20 (urging Court to grant review to fashion judicial remedy under *Franklin*). It does not appear that any constitutional claims were raised in the courts below. Petitioners apparently did not raise an argument under *Franklin* in the courts below, although it was discussed in an *amicus* brief on appeal and in the intervenors' rehearing petition. See Nat'l Federation of the Blind et al. C.A. *Amici* Br. 17-19; C.A. Pet. for Rehearing

The court of appeals correctly interpreted the Act as limiting the authority of an arbitration panel convened under Section 107d-2(b)(2) to the making of a determination whether "acts or practices" of a federal entity are in violation of the Act or regulations issued thereunder. If the arbitration panel finds that the federal entity's acts or practices are in violation of the Act or regulations, the plain language of the Act commands the head of the federal entity to rectify the violation—the federal entity head must "cause such acts or practices to be terminated promptly" and must "take such other action as may be necessary to carry out the decision of the panel." 20 U.S.C. 107d-2(b)(2). The court of appeals thus accurately ruled that "the statute places the responsibility for ending the violation on the head of the federal entity and does not authorize a § 107d-1(b) arbitration panel to order the federal entity to take specific remedial action." Pet. App. 10a.

The Court's ruling in *Franklin* does not suggest otherwise. As this Court recently explained, *Franklin* involved an action against non-federal defendants, and the presumption on which the Court relied in that case cannot trump federal statutory provisions that limit the remedial scheme that is available in a matter involving a federal agency. See *Lane* v. *Pena*, 116 S. Ct. 2092, 2098-2099 (1996); see also *Franklin*, 503 U.S. at 68 (presumption applies only where Congress has not expressed a contrary intent).

2. Petitioners assert (96-1550 Pet. 17-18; 96-1551 Pet. 11-16) that the court of appeals' decision conflicts with the decisions in *Randolph-Sheppard Vendors of*

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and Suggestion of Rehearing In Banc of Nat'l Federation of the Blind et al. 11, 15.

America v. *Weinberger*, 795 F.2d 90 (D.C. Cir. 1986), and *Minnesota Department of Economic Security* v. *Riley*, 107 F.3d 648 (8th Cir. 1997).

a. The court below did not, as petitioners suggest (96-1550 Pet. 17; 96-1551 Pet. 11-12), expressly disagree with the ruling of the D.C. Circuit in *Weinberger*. It simply declined to read into dicta in the *Weinberger* opinion an interpretation of the Act that is inconsistent with the plain statutory language.

The *Weinberger* court did not address the question presented by the instant case. It involved an action brought in federal district court directly against the head of a federal entity that controlled federal properties (military bases) to challenge two government contracts for the construction and operation of fast-food restaurants on those properties. 795 F.2d at 92. None of the plaintiffs had sought arbitration under the Act, and the D.C. Circuit ruled that the suit was barred because the plaintiffs had failed to exhaust the Act's administrative remedies, which the court concluded were mandatory. *Id.* at 93.

In the course of its discussion of the exhaustion issue (see 795 F.2d at 100-111), the *Weinberger* court considered whether various exceptions to the exhaustion doctrine should apply, including whether the plaintiffs would suffer irreparable injury absent immediate judicial review. The court concluded that no such injury would result based on a series of factors, including that there was no unusual delay in the administrative process, the administrative process might yield relief if a violation were found, and a stay could have preserved the plaintiffs' rights. *Id.* at 107-111. In its description of the possible relief available in the administrative process, the court stated that it "appears," that it "may well be," and

that it "might well be" that the Secretary could provide broad remedies against the federal entity if the panel found statutory or regulatory violations. *Id.* at 109. Due to the context in which the statements were made, the court did not provide a supporting rationale for that speculation. Because the court did not have before it an actual arbitration panel order that purported to grant specific remedial relief against a federal entity, the court did not actually rule on the scope of the remedies available from an arbitration panel against a federal entity. Such speculation about what type of relief might be available from an arbitration panel cannot carry great weight, and does not in any event give rise to a circuit conflict.[8]

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[8] The court of appeals' ruling also does not conflict with other cases cited by petitioners (96-1551 Pet. 10-11) that focused primarily on the debate about whether exhaustion of administrative remedies is mandatory under the Act. See, *e.g.*, *Fillinger* v. *Cleveland Society for the Blind*, 587 F.2d 336, reh'g denied, 591 F.2d 378 (6th Cir. 1978); *New York* v. *United States Postal Service*, 690 F. Supp. 1346, 1349 (S.D.N.Y. 1989); and *Massachusetts Elected Comm. of Blind Vendors* v. *Matava*, 482 F. Supp. 1186, 1189 (D. Mass. 1980). Those cases did not hold that an arbitration panel convened under Section 107d-2(b)(2) is authorized to order a federal entity to take specific remedial action.

Other cases cited by petitioners (96-1550 Pet. 18; 96-1551 Pet. 11, 15) are readily distinguishable as well because they involved arbitration panels convened under Section 107d-2(b)(1) (not under Section 107d-2(b)(2)), and addressed issues regarding the availability of damages against a State. See, *e.g.*, *Tennessee Dep't of Human Servs.* v. *United States Dep't of Educ.*, 979 F.2d 1162, 1165 (6th Cir. 1992); *McNabb* v. *United States Dep't of Educ.*, 862 F.2d 681, 684 (8th Cir. 1988) (Lay, C.J., concurring and dissenting), cert. denied, 493 U.S. 811 (1989); *Delaware Dep't of Health & Social Servs.* v. *United States Dep't of Educ.*, 772 F.2d 1123, 1136 (3d Cir. 1985). The

b. The court of appeals' decision also does not conflict with the Eighth Circuit's recent decision in *Minnesota Department of Economic Security* v. *Riley*, 107 F.3d 648 (1997). The *Riley* court explicitly noted that its ruling does not raise the concerns addressed by the ruling in the instant case or in *Georgia Department of Human Resources* v. *Nash*, 915 F.2d 1482 (11th Cir. 1990), because the arbitration panel in that case "never ordered the [federal entity] to take any remedial action, but simply decided" that certain action "would violate the Act." 107 F.3d at 650. The Eighth Circuit emphasized that the arbitration panel in that case "did exactly what the statute authorizes." *Ibid.* The *Riley* court's ruling that a federal entity cannot ignore its statutory responsibility to bring itself into compliance with the Act is not inconsistent with the ruling below.[9] The ruling below does not suggest that a federal entity

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statutory text makes clear that the authority of an arbitration panel under Section 107d-2(b)(1) is different in relevant respects from that of an arbitration panel under Section 107d-2(b)(2), so that those cases do not conflict wit the ruling below. See note 2, *supra*; see also State of Colorado et al. *Amici* Br. 15-16 (conceding that such cases are not directly on point but suggesting that they add confusion to the issue).

[9] The attempt by petitioners (see 96-1551 Pet. 11, 13-14) to create a conflict between the ruling below and an earlier Eighth Circuit decision fails for the same reason. The court there did not address the issue presented here. It affirmed the district court's ruling that had set aside an arbitration panel order allowing the parties to negotiate an agreement outside the Act's permit requirements. *Minnesota, Dep't of Jobs and Training* v. *Riley*, 18 F.3d 606, 608 (1994). In doing so, the court merely affirmed the principle that it later emphasized in its other *Riley* opinion—that federal entities subject to the Act must abide by the Act's requirements. *Ibid.*

can evade its obligations under the Act. Moreover, the district court suggested that, if a federal entity advances a remedy that is plainly inadequate, the state licensing agency would not be precluded from challenging that remedy through an independent APA action, although it declined to engage in such review based on the circumstances of this case. See note 6, *supra*.[10]

c. The ruling below is consistent with the analysis of the other federal courts that have discussed the question. See *Nash*, 915 F.2d at 1487-1495; *United States* v. *Mississippi Vocational Rehabilitation for the Blind*, 794 F. Supp. 1344 (S.D. Miss. 1992). Those courts have similarly opined that an arbitration panel convened under Section 107d-2(b)(2) to resolve a dispute between a state licensing agency and a federal entity has no remedial authority. As the *Nash* court recognized, Congress's inclusion of language in Section 107d-2(b)(2) limiting the panel's authority to resolution of whether a federal entity has violated the Act and imposing on the federal entity the obligation to end the violation, while omitting such language from Section 107d-2(b)(1), establishes that Congress acted intentionally when it limited the remedial authority of Section 107d-2(b)(2) arbitration panels. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in

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[10] The district court indicated that it would have jurisdiction to review final agency action of respondent, but declined to do so because petitioner had not made an adequate factual showing. Thus, there is no merit to petitioners' argument (96-1551 Pet. 20-22) that the decision below creates a constitutional due process problem. See also note 7, *supra* (constitutional claims not raised below).

another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); see also *Brown* v. *Gardner*, 513 U.S. 115, 120 (1994).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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